No. 87-1478

In The
Supreme Court of the United States
October Term, 1987

MEDALLION TELEVISION ENTERPRISES, INC. and JOHN ETTLINGER,

Petitioners,

v.

SELECTV OF CALIFORNIA, INC., JAMES LEVITUS, LIONEL SCHAEN and RICHARD KULIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 28.1 STATEMENT

SelecTV of California, Inc. is a wholly-owned subsidiary of Telstar Corporation. At the time of the events at issue, it was a subsidiary of SelecTV of America, Ltd., which was an affiliate of Clarion Co.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The respondents, SelecTV of California, Inc., James Levitus, Lionel Schaen and Richard Kulis, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. The opinion, as amended on February 26, 1988, is reported at 833 F.2d 1360 (9th Cir. 1987). The District Court's opinion is reported at 627 F.Supp. 1290 (C.D.Cal. 1987).

REASONS WHY THE WRIT SHOULD BE DENIED

This case is not an appropriate vehicle for clarification of the "pattern" requirement contained in the RICO statute.

Before this Court decided *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275 (1985) ("*Sedima*"), several courts, including the District Court in this case, interpreted the RICO statute, 18 U.S.C. § 1961, *et seq.*, as permitting a plaintiff to establish that a defendant engaged in a "pattern of racketeering activity" in violation of the provisions of 18 U.S.C. § 1962, merely by showing that the defendant committed two or more "predicate acts" of "racketeering activity." See Appendix to Petition at p. 46a.

In *Sedima*, this Court noted that the RICO statute defined "pattern of racketeering activity" as requiring at least two acts of "racketeering activity." After examining the legislative history of the statute, the Court noted that "proof of two acts of racketeering activity, without more, does not establish a pattern." *Sedima*, 473 U.S. 479, 496 n.14, 105 S.Ct. 3275, 3285 n.14 quoting 116 Cong. Rec. 18,940 (1970) (statement of Sen. McClellan).

Since that decision, most of the courts which have considered the issue (as evidenced by the cases cited in the petition) have concluded that the "pattern" requirement of RICO cannot be satisfied by a mechanical counting of the number of predicate acts. In cases where mail fraud or wire fraud are the alleged predicate acts, a mechanical test would amount to a mere counting of the number of telephone calls placed or envelopes mailed.

An inevitable consequence of the rejection of a bright-line counting test, in favor of a test requiring a meaningful analysis of whether a "pattern" exists, is that courts will be called upon to undertake a case-by-case analysis of when and under what circumstances a pattern may be found. The Ninth Circuit recognized as much in its opinion in this case:

> Our approach admittedly does not provide a bright-line rule. We believe, however, that as more cases are decided, it will become easier to distinguish between cases like this and *Schreiber*, which involved single victims and isolated transactions with no indication that the defendant would need to commit further predicate acts, and cases like *Sun Savings* and *California Architectural*, which involved ongoing schemes, numerous victims, and a risk of continuing illegal activity.

833 F.2d at 1365, Appendix to Petition at 9a.

Yet, it is neither uncommon nor undesirable for the law to develop in such a manner. Certainly, "pattern" is no more difficult a concept to explain and develop through case-by-case analysis than "restraint of trade" under the Antitrust Laws, "minimum contacts" under jurisdictional decisions or "state action" under the Fourteenth Amendment.

The question, then, is whether there is anything about the record of this case or the opinions below which would enable this Court, if it accepted the case, to advance or enhance materially the development of the law under RICO. The answer, clearly, is no.

The substance of petitioners' claim is that they were fraudulently induced to enter into a joint venture agree-

ment to promote a boxing match. The alleged misrepresentations which induced them to enter into the joint venture were made at a face-to-face meeting in a restaurant. Yet, because two otherwise innocent telephone calls were placed to schedule that meeting, and because petitioners themselves used the wires to transmit the irrevocable letters of credit which served as their monetary contribution to the venture, they contend that a "pattern" may be found.

As the Ninth Circuit observed, "[i]f the fraud alleged here constitutes a pattern of racketeering activity, rare would be the fraud that could not be pleaded as a RICO case. Although we observe *Sedima's* mandate that RICO be construed broadly . . . we cannot believe that Congress intended that RICO should apply to a single isolated transaction such as this." 833 F.2d at 1365, Appendix to Petition at 9a.

Thus, assuming, *arguendo*, that the Circuits differ with regard to where, on the continuum between no pattern and clear pattern, they draw the line at which a plaintiff's case succeeds or fails, none of the cases cited by petitioners would support the finding of a pattern in this case.[1]

Stated simply, the only way a "pattern" could be found on this record would be if the Court retreated from

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[1]Petitioner makes much of the fact that the Ninth Circuit, in *Sun Savings & Loan Ass'n. v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987), expressed reservations about the District Court's reported decision in this case. In fact, Judge Norris, who authored the Ninth Circuit's opinion in this case and served on the panel that decided *Sun Savings*, explained why the reservations expressed in *Sun Savings* proved to be of no concern after a review of the record in this case. Appendix to Petition at 8a-9a.

footnote 14 of *Sedima*, returned to the bright-line test which some courts followed prior to *Sedima*, and held that two or more predicate acts, standing alone, satisfy the pattern requirement of the statute. Given the breadth of the mail fraud and wire fraud statutes, such a rule would often yield nothing more than a mere mechanical counting of telephone calls and mailings and would bring within the jurisdiction of the federal courts virtually every common-law fraud action. *See Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322, 325 (7th Cir. 1986) (concurring opinion of Cudahy, J.); *Tkaczuk v. Weil*, [1987] Fed. Sec. L. Rep. (CCH) ¶ 93,199 at p. 95,932 (N.D. Ill. 1987).

Finally, petitioners' assertion, that a party who allegedly commits fraud also commits an additional "predicate act" if it fails thereafter to advise the victim that it defrauded him, is a bootstrap argument which cannot serve as a basis for creating a pattern where none exists.

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CONCLUSION

For the foregoing reasons, respondents respectfully urge the Court to deny the petition for a writ of certiorari.

Dated: April 1, 1988

Respectfully submitted,

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